UNITED STATES
COURT OF APPEALS
FIFTH CIRCUIT
FILED
August 21, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-31208

PEARL MOODY

Plaintiff-
Appellant,

versus

UNITED STATES
SECRETARY OF THE ARMY, Defendant-
Appellee

Appeal from the United States District Court
For the Western District of Louisiana
(01-CV-111)

Before JOY, HIGGINBOTHAM, and STEWART, Circuit Judges.

PER CURIAM:*

Pearl Moody appeals the district court's grant of summary judgment, dismissing all of her claims. Moody alleged that her employer, the United States Army, discriminated against her because of her age, in violation of the Age Discrimination in Employment Act (ADEA),[1] as well as Louisiana's state age discrimination law.[2] We affirm on the basis that Moody has failed to demonstrate a prima facie case of age discrimination.

I.

Moody alleges that her supervisor, Ellis Smith, harassed her for several years based on her age, and refused to give her a promotion or reevaluate her job and upgrade her pay scale to reflect the work she was actually doing. Moody complained to the Equal Employment Opportunity Office, and eventually entered a settlement agreement to resole the dispute. However, after Moody concluded that the Army was failing to follow through on the settlement, she sued in district court. The Army moved to dismiss on the basis that

---

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[1] 29 U.S.C. § 621, *et seq.*

[2] The district court dismissed Moody's state law claims and she has not appealed that decision here.

the dispute had been resolved by the settlement agreement, but the district court concluded that both parties breached the terms of the agreement and therefore it was void. Neither party appeals that decision. The Army then moved for summary judgment based on Moody's alleged failure to exhaust administrative remedies, or alternatively, failure to make out a prima facie case of age discrimination. The district court granted summary judgment in favor of the Army and dismissed Moody's claims with prejudice. The district court also granted the Army's motion to strike several exhibits from Moody's response, and denied Moody's Rule 59(e) Motion to Amend Judgment. Moody has not appealed either of these decisions. Moody timely appealed the grant of summary judgment.

We review a grant of summary judgment *de novo*, applying the same standard as the district court.[3] Summary Judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[4] An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.[5] Although the district court dismissed Moody's claims for failure to exhaust administrative remedies, the Army also urges that Moody failed to make out a prima facie case of discrimination. We turn to this alternative basis first.[6]

---

[3] See *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 205 (5th Cir. 1998).

[4] See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *see also* Fed. R. Civ. P. 56(c).

[5] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[6] The timely filing requirements of the ADEA function as statutes of limitations rather than a prerequisite for jurisdiction. *See Rhodes v.*

A claim for violation of the ADEA may be established by direct or circumstantial evidence. If the plaintiff provides circumstantial evidence of discrimination, the familiar burden shifting framework of *McDonnell Douglas* applies.[1] Under *McDonnell Douglas*, the plaintiff must first establish a prima facie case of discrimination, which the defendant must then rebut by producing a legitimate, nondiscriminatory justification for its actions. The plaintiff must then demonstrate that the proffered reasons are pretextual, and establish that the defendant's actions were discriminatory.[2]

To establish a prima facie case of failure to promote base don age discrimination, the employee must demonstrate that "1) he belongs to the protected class, 2) he applied to and was qualified for a position for which applicants were being sought, 3) he was rejected, and 4) another applicant not belonging to the protected class was hired."[3] Here, Moody alleges that she asked for a promotion on numerous occasions, although she only cites a single occasion on February of 1995 when she applied for an open position. She claims that Smith changed the job description of the position for which she applied, and "[t]he effect of this change was to deny Moody the promotion." She also alleges that Smith gave the promotion to a much younger employee.

Guiberson Oil Tools Div., 927 F.2d 876, 878 (5th Cir. 1991); *Henderson v. Untied States Veterans Admin.*, 790 F.2d 436, 440 (5th Cir. 1986). Therefore, we need not decide the timeliness of Moody's claims before addressing their merits.

[1] *See Evans v. City of Houston*, 246 F.3d 344, 349 (5th Cir. 2001) (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)).

[2] *Id.* at 350.

[3] *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 680-81 (5th Cir. 2001) (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)).

It is clear that Moody, who is 62 years-old, is a member of the protected class and that she was rejected for the promotion. However, the summary judgment evidence does not establish that Moody was qualified for the position for which she applied. Likewise, there is no summary judgment evidence before us which indicates that the position was given to someone who was not a member of the protected class.[4] Therefore, Moody has failed to establish a prima facie case based on a failure to promote.

Similarly, Moody has also failed to establish a prima facie case for any claim that she failed to receive a pay raise or a reevaluation of her pay scale to reflect the work she was actually performing. To establish such a claim, she must demonstrate that younger employees who were similarly situated received raises or reevaluation of their pay scales.[5] Although she claims that she is the lowest paid employee in her department, she has not presented any evidence that other *similarly situated* younger employees are paid more. The fact that she is the lowest paid employee, without more, cannot establish a prima facie case of discrimination.

Because Moody has failed to establish a prima facie case of discrimination under the *McDonnell Douglas* framework, she must establish discrimination by direct evidence.[6]

---

[4] Moody refers only to a stricken exhibit which states that the position was given to "a friend" of Smith's. Even if we were to consider this stricken evidence, it does not establish that Moody was qualified for the position or that it was given to someone younger.

[5] *See Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1062 (5th Cir. 1998).

[6] *See Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 404 (5th Cir. 2001) (stating that where the plaintiff's claims cannot survive under the

Although Moody alleges that Smith engaged in a long-running pattern of harassment, her detailed log of Smith's behavior cites only four instances where Smith's behavior evidence discriminatory animus. In August, 1997, he asked Moody, "Granny have not got anything to do?;" on August 26, 1998, he directed someone to Moody by stating, "See that old woman and she will take care or you;" on August 31, 1998, he asked Moody, "old woman, when are you going to retire and go home so someone younger can have a job?"; and again on September 17, 1998, he asked, "Granny, when are you going to retire and let someone younger have a jog?"[7]

We analyze remarks presented as direct evidence of discrimination under the test articulated in *Brown v. CSC Logic, Inc.*[8] "For comments in the workplace to provide sufficient evidence of discrimination, they must be 1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the [employment decision]; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue."[9]

We begin by noting that all of the remarks occurred well after the denial of the promotion in 1995, and thus cannot be

---

McDonnell Douglas framework, the plaintiff must prove discrimination by direct evidence.

[7] Moody also complains of other harassing behavior by Smith, and alleges that it was motivated by her age. Even assuming that this unsupported allegation is true, Smith's other behavior is not direct evidence of age discrimination.

[8] *See Laxton v. Gap, Inc.* 333 F.3d 572, 583 n. 4 (5th Cir. 2003); *Auguster*, 249 F.3d at 405.

[9] *Id.* (internal quotation marks and brackets omitted).

evidence of discriminatory motive in denying the promotion. They could, however, be evidence of discriminatory motive in failing to give Moody a raise, or to reevaluate her pay scale. Only the remarks made on August 31 and September 17 are arguably related to a failure to grant a pay raise, whereas the other two remarks merely evidence animus directed at Moody based on her age and thus are not direct evidence of discrimination. However, because Moody does not indicate when she asked for and was denied a pay raise, other than to state that she "repeatedly asked" for a promotion, we cannot evaluate whether these comments are proximate in time to any employment action. We therefore find that these two comments do not raise an issue of material fact sufficient to avoid summary judgment.

Finally, Moody alleges that the comments listed above constitute a hostile work environment. While these comments are offensive and boorish, they are not "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[10]

III.

We therefore AFFIRM the district court's grant of summary judgment dismissing all of Moody's claims with prejudice.

---

[10] *Shepard v. Comptroller of Pub. Accounts of the State of Tex.*, 168 F.3d 871, 874 (5th Cir. 1999) (internal quotation marks and brackets omitted).

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

PEARL MOODY **VERSUS** **THOMAS E. WHITE, SECRETARY OF THE ARMY**	**CIVIL ACTION NO. CV01-0111** **JUDGE TRIMBLE** **MAGISTRATE JUDGE WILSON**

MEMORANDUM RULING

Presently before the court is a Motion to Dismiss [doc.25] pursuant to Rule 12(b)(6) filed by the defendant. The plaintiff filed an opposition [doc.36] and the Army filed a reply.

Facts and Procedural History

The plaintiff, Pearl Moody ("Moody"), alleges that the Department of the Army discriminated against her on the basis of age when her former supervisor, Ellis Smith ("Smith") engaged in a pattern of harassing and discriminating remarks. The plaintiff also claims that the Department of the Army, specifically Ellis Smith, discriminated against her by refusing to promote her based upon her age.

On November 2, 1999, Moody filed an informal complaint with an Equal Opportunity Counselor, Barbara Warren ("Warren"), at the Equal Opportunity Programs office, Fort Polk, Louisiana. The informal complaint alleged

that Smith had called the plaintiff "granny", "old lady", and "old woman." The complaint also listed occasions when Smith allegedly harassed or made fun of the plaintiff. The informal complaint listed one occasion when the plaintiff was asked to do something that was part of someone else's job (August 27, 1998). In her informal complaint, Moody requested a formal apology from Ellis Smith and a promotion to GS-06.

On January 27, 2000, Moody informed Warren that she wanted to vacate counseling and mediate her complaint. On February 3, 2000, Warren conducted a final interview with the plaintiff and informed her of her right to file a formal complaint.

On April 25, 2000, Moody signed a mediation Checklist indicating a desire to mediate the case, outlining the issues for mediation and the relief sought.

On May 4, 2000, Moody participated in a mediation session with a representative from the Directorate of Public Works, Jim Kelley, The mediator was John Costa. The parties agreed to a settlement proposal during the mediation session and the appropriate government approvals for the settlement were obtained.

On July 11, 2000, all the parties finalized the Negotiated Settlement Agreement ("NSA"). In the NSA, the Army agreed to do the following:

1) Counsel Smith in the use of the chain of command. This session was to be completed within ten days from the July 11, 2000 date of the agreement.

2) Counsel Smith on professional and common courtesy. This session was to be completed within

ten days from the July 11, 2000 date of the agreement.

3) Provide Moody with a written and oral apology from Smith in regard to his behavior towards her The oral apology was to be made in the presence of the Director, DPW. This session was to be completed within ten days from the July 11, 2000 date of the agreement.

4) Submit Moody's job description to the Position Management Group ("PMG") within 30 days of the agreement. Within 5 days of the completion of the position description review, an audit from the PMG was to be requested.

5) Conduct specialized training on treatment and respect of others with DPW, ESPD personnel and with John Costa present at all sessions.

In the NSA, Moody agreed that:

1) Her signature on the NSA constitutes a full and complete settlement of this complaint;

2) She will withdraw the complaint and further waives the right to sue over the matters raised in this complaint and agrees that they will not be made the subject of future litigation; and

3) That the army will not pay the costs or attorneys fees associated with this complaint and settlement.

If the plaintiff believed that the Army filed to comply with the terms of the settlement agreement she was to notify the EEOCCRA, in writing, of the alleged noncompliance.

The Army admitted that they did not comply with the terms of the NSA until December 13, 2000, and that the training was not conducted until March of 2001.

The plaintiff argued that the tardiness was not the only noncompliance. The verbal apology was to be made in the presence of the director. The director at the time was Lt. Col. Mazion and he was not present. John Costa, the mediator, never attended the training classes as mandated by the NSA.

The Army argued that Moody never filed the required notice with the EEOCCRA. The copy of the letter that the plaintiff sent was attached to EXh. I of the Army's motion, but the plaintiff merely gave notice of her intent to sue. Moody states that the letter was never answered by the EEOCCRA, so she filed with the EEOC. Counsel for the plaintiff argues that the plaintiff is a lay person and should not be held to the same standards as an attorney when judging the content of the letter.

On November 29, 2000, the EEOC informed the Army of the Plaintiff's intent to sue and notified Moody of her right to file suit. The Army responded that it had complied with all the terms of the NSA on January 8, 2001[11] Moody filed this suit on February 9, 2001.

The Army previously moved for summary judgment on the grounds that the negotiated settlement agreement precluded Moody's claim, but this court denied that the motion holding that breaches by both parties voided the settlement agreement.

---

[11] Even though the required training was not completed until March, 2001.

The Army is now moving to dismiss Moody's complaint arguing that the Court lacks subject matter jurisdiction. The Army argues that the United States has conditioned its waiver of sovereign immunity under the ADEA upon the plaintiff either filing an administrative claim within 45 days of the alleged discriminatory act or providing the EEOC with notice of intent to file suit within 180 days of the alleged act. The Army argues that sovereign immunity also requires the court to strike Moody's Louisiana state law claim, as well as her request for a jury trial, compensatory damages, general and special damages, and liquidated damages.

The Army also argues that Moody has failed to state a claim upon which relief can be granted. The Army asserts that the remarks about which Moody complains do not amount to an adverse personnel action and do not entitled her to relief under the ADEA. Additionally, the Army takes the position that Moody cannot establish a prima facie failure to promote case as she cannot show that she ever applied for or was qualified for a promotion or upgrade.

Law and Analysis

A. Jurisdictional Issues

"In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign and not enlarge the waiver beyond what the language requires." *Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) (citations omitted) (internal quotation marks omitted); accord *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). Thus, waiver cannot be implied; it must be unequivocally expressed.

United States v. Mitchell, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980); *Dorsey v. U.S. Dep't of Labor*, 41 F.3d 1551, 1554-55 (D.C. Cir. 1994).

The court in *Forman v. Small*, 271 F.3d 285 (C..A.D.C., 2001), discussed federal sovereign immunity with the respect to ADEA claims:

> Congress expanded the scope of the ADEA in 1974 to include state and local governments and federal employers. See Pub.L. No. 93-259, 88 Stat. 74 (1974) (codified as amended at 29 U.S.C. §§ 630(b), 633(a). Unlike state and local governments, which were merely added to the definition of "employer" in the ADEA, Congress created an entirely new section of the ADEA in which it waived federal sovereign immunity. This section, codified as § 633a, provides that "[a]ll personnel actions affecting [federal agency] employees ... shall be made free from any discrimination based on age." 29 U.S.C. § 633 a(a). Thus, "Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector." *Lehman v. Nakshian*, 453 U.S. 156, 167 n. 15, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981).

> ...Congress used sweeping language when it subsequently extended the ADEA to cover federal agency employees. Congress required no less than that "[a]ll personnel actions affecting employees ... who are at least 40 years of age ... shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a) (emphasis added).

Forman v. Small, 271 F.3d 283, 296 (C..A.D.C., 2001).

The ADEA gives a federal employee alleging age discrimination two avenues to pursue relief. First, she can file an Equal Employment Opportunity (EEO) complaint with the employing agency. 29 U.S.C. § 633a(b). If seeking relief under the administrative process, the employee must consult an EEO Counselor within 45 days of the date of the alleged discriminatory matter. 29 C.F.R. § 1614.105(a)(1).

The second option available to a federal employee is a suit in federal court. 29 U.S.C. § 633a(c) and (d). If an employee seeks to bypass the administrative process and proceed in federal court, the employee must give notice of her intent to file a lawsuit to the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged unlawful practice occurred. She must then wait thirty days before filing suit, 29 U.S.C. § 633 a(d).

Federal employees must seek informal counseling before they file an EEOC complaint. 29 C.F.R. § 1614.105(a). If the employee fails to do so, his claim is barred. *Pacheco v. Rice*, 966 F.2d 904, 904 (5th Cir. 1992). The employee must

establish waiver, estoppel, or equitable tolling to circumvent this requirement. *Id.* Moody sought relief administratively.

Moody visited the EEO office in 1995 and 1997. She contacted the installation EEO office to file a formal complaint for the first time in July 14, 1999. The Army argues then, that any age-based discriminatory activity that occurred beyond 45 days prior to that date, or prior to May 30, 1999, should be barred.

Moody argues that *National Railroad Corp. v. Morgan*, - U.S. -, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), saves her complaint from dismissal for failure to exhaust administrative remedies. In *Morgan*, the plaintiff filed a discrimination and retaliation claim against Amtrak with the EEOC. He alleged that he had been subject to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment. Under Title VII of the Civil Rights Act of 1964, a plaintiff shall file an employment discrimination charge with the EEOC either 180 or 300 days after an alleged unlawful employment practice has occurred. While some of the discriminatory acts occurred within 300 days of the plaintiff's EEOC filing, many took place prior to that time. The United States Supreme Court held that a Title VII plaintiff making claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate 180 or 300 day period, but a charge alleging hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period.

In the instant case, Moody elected to file her complaint through the administrative process. Under the avenue of relief, she was required to contact the EEO office within 45 days of the alleged discriminatory act. Although Moody visited the EEO office in 1995 and 1997, the only formal

complaint was filed on July 14, 1999. The Army contends that, during her 1995 and 1997 visits, Moody did not put the EEO office on notice that she had a situation that she wanted to resolve through EEO channels. *Jensen v. Frank*, 912 F.2d 517, 520 (1st Cir. 1990) (An employee must allege facts that the counselor should have reasonably concluded that the employee was seeking to resolve, through EEO channels, an allegation of discrimination). The plaintiff offered no competent summary judgment evidence that she put the EEO office on notice in 1995 or 1997.

The court finds that *Morgan*, as applied to the facts of this case, requires that some alleged act of discrimination must have occurred within the 45 day period of time prior to Moody filing the EEO complaint. All of the allegations contained in Moody's complaint and in the memorandum submitted to the EEO office appear to have occurred prior to May 30, 1999. Ellis's alleged age-related comments occurred on August 14, 1997, August 26, 1998, August 31, 1998 and September 17, 1998.[12] These age related claims are clearly untimely.

Moody also alleges that Ellis promised to promote her in February 1995, but then changed her job description and did not promote her. This claim is also untimely. Although Moody alleges that she has repeatedly been denied promotions, she does not allege when these incidents occurred.

The burden is upon Moody to establish waiver, estoppel, equitable tolling to circumvent the forty-five day requirement. Because Moody has not me this burden and has not alleged that she applied for, and was denied a promotion or otherwise suffered an adverse action after May 30, 1999, this court has no jurisdiction.

---

[12] See diary of complaints to the EEO office. Govt Exh. C.

Bypassing the Administrative Process

Although the ADEA provides a statute of limitations for claims against private employers, 29 U.S.C. § 626(e)(1) (two years or, for willful violations, three years), there is no express limitations provision in section 633a (i.e., applicable to federal employees). The Act allows a federal employee to choose relief prior to a civil action or proceed directly to court. If a complainant chooses to sidestep the administrative process, the ADEA provides a limitations period. 29 U.S.C. § 633a(d). "In lieu of pursuing administrative relief, the employee may proceed directly to federal district court ... no later than 180 days from the alleged discriminatory act, and providing that he or she first has filed a notice of intent to sue within 30 days prior to commencing suit."[13]

With respect to the instant complaint pursuant to the ADEA, Moody gave notice of her intent to file suit on October 25, 2000. Anything that occurred before April 29, 2000 therefore falls outside of the 180-day window and is untimely.

B. Remaining Claims

The ADEA is the exclusive remedy for a federal employee complaining of age discrimination.[14] Accordingly, Moody's claims pursuant to Louisiana State law will be dismissed.

---

[13] *Castro v. United States*, 775 F.2d 399, 403 (1st Cir. 1985) (citing, 29 U.S.C. § 633a(d)).

[14] *Paterson v. Weinberger,* 644 F.2d 521, 525 (5th Cir. 1981).

Moody's claims of discrimination are governed by the tripartite burden- shifting test established by *McDonnell Douglas v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this test, if Moody establishes a prima facie case of discrimination, the burden shifts to the Army to articulate a legitimate, non-discriminatory reason for reassigning Moody. See *id.* If the Army satisfies this burden, the burden shifts back to the plaintiff, who must prove that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.s. 133, 120 S.Ct. 2097, 2104-05, 147 L.Ed.2d 105 (2000).

Moody must establish a prima facie case of discrimination by showing that (1) she suffered an adverse job action; (2) she was qualified for the position he occupied; (3) she was within the protected class at the time of the demotion; and (4) she was replaced by someone not within the protected class. See *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1060 (5th Cir. 1998); see also *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 n. 3 (5th Cir. 1996) (en banc) (noting that the same analytical framework is applied to Title VII and ADEA discrimination cases). The Army in this case argues that Moody did not suffer an "adverse employment action" and therefore cannot establish a prima facie case of discrimination.

The plaintiff argues that compensation is an ultimate employment decision. Under the ADEA it is unlawful to "discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1)(1999).

Moody alleges that she is the lowest ranking employee at Fort Polk in the Department of Public Works in the Engineering Plans and Services Division. Moody alleges that she was "doing the work of higher grade employees." But, Moody cannot establish a prima facie case of discrimination. She has not demonstrated that she suffered an adverse job action. The fact that she was the lowest ranking employee does not constitute discrimination. He unsupported and conclusory statement that she believed that she was doing the work of higher ranking employees does not create a genuine issue of material fact. Additionally, the plaintiff has introduced no evidence whatsoever that any action taken by the Army was based upon Moody's age. Although Moody was purportedly qualified for the position she occupied and she was within the protected class at the time of her termination, there has also been no evidence introduced by the plaintiff that she was replaced by someone not within the protected class.

Additionally, the ADEA does not entitled a federal employee to a jury trial.[15] Nor are claims for compensatory damages, liquidated damages or "special and general damages" authorized by the ADEA.[16] Accordingly, these claims will be dismissed.

Moody also alleged that she had "to do surveys, boundaries, encroachments, estimates of new buildings, and duties which are not included in her job description. She further alleges that she was denied a promotion by Ellis Smith and that he gave the promotion to one of his friends. These allegations, absent evidence that they were motivated by age, do not violate the ADEA.

---

[15] *Lehman v. Nakshian*, 453 U.S. 156, 165, 101 S. Ct. 2698, 69 L.Ed.2d 548 (1981).

[16] *Smith v. Office of Personnel Management*, 778 F.2d 258, 262 (5th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986).

Conclusion

This court does not have jurisdiction over this action and it will be dismissed.

Lake Charles, Louisiana, this 17th day of September, 2002.

/s/
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

STATUTES:

29 U.S.C. § 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 U.S.C. §§621 et seq.;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) Employment agency practices. It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices. It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc. It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a

bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) [29 USCS § 631(a)] because of the age of such individual;
or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the

involuntary retirement of any individual specified by section 12(a) [29 USCS § 631(a)], because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) [Deleted]

(h) Foreign practices.

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account;

distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees.

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years or participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to

such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 206(a)(3) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1056(a)(3)] and section 401(a)(14)(C) of the Internal Revenue Code of 1986 [26 USCS § 401(a)(14)(C)], and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1053(a)(3)(B)] or section 411(a)(3)(B) of the Internal Revenue Code of 1986 [26 USCS § 411(a)(3)(B)], then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of the Internal Revenue Code of 1986 [26 USCS § 414(q)]) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of the Internal Revenue Code of 1986 [26 USCS §§ 401 et seq.].

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m).[.]

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(h) of the Internal Revenue Code of 1986 [26 USCS § 411(b)(1)(H)(v)] and subparagraphs (C) and (D) of section 411(b)(2) of such Code shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 3(24)(B) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(24)(B)] and section 411(a)(8)(B) of the Internal Revenue Code of 1986 [26 USCS § 411(a)(8)(B)].

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(B) The term "compensation" has the meaning provided by section 414(s) of the Internal Revenue Code of 1986 [26 USCS § 414(s)].

(j) Employment as firefighter or law enforcement officer. It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B) (i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996 [enacted Sept. 30, 1996]; or

(ii) if applicable State or local law was enacted after the

date of enactment of the Age Discrimination in Employment Amendments of 1996 [enacted Sept. 30, 1996] and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

(k) Seniority system or employee benefit plan; compliance. A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deduction from severance pay; reduction of long-term disability benefits. Notwithstanding clause (i) or (ii) of subsection (f)(2)(B)—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) solely because—

(A) an employee pension benefit plan (as defined in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2))) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 3(35) of such Act [29 USCS § 1002(35)] provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2) (A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension;
or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(17)]) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E) (i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $ 3,000 per year for benefit years before age 65, and $ 750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $ 48,000 for individuals below age 65, and $ 24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on the date of enactment of this subsection [enacted Oct. 16, 1990], and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after the date of enactment of this subsection [enacted Oct. 16, 1990], based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans. Notwithstanding subsection (f)(2)(B), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 [20 USCS § 1001]) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this Act;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

29 U.S.C. § 631. Age limits

(a) Individuals at least 40 years of age. The prohibitions in this Act shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government. In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 15 of this Act [29 USCS § 633a], the prohibitions established in section 15 of this Act [29 USCS § 633a] shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers.

(1) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $ 44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the

benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

29 U.S.C. § 633. Federal-State relationship

(a) Federal action superseding State action. Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings. In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 USCS § 626] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.